

## **Early Impact From California Appellate Court Opinion In The Domino Pizza Case**

**By: James M. Mulcahy**

As most of you know, in the Domino Pizza case, the employee of a Domino's Pizza franchisee sued the franchisee and Domino's Pizza for alleged sexual harassment by a supervisor – an employee of the franchisee. The trial court granted Domino Pizza's motion for summary judgment, concluding that the plaintiff failed to make the required factual showing of control over the franchisee by Domino's Pizza sufficient to warrant a finding of an agency relationship, and, therefore dismissed the lawsuit against Domino's Pizza. After being affirmed by a three judge appellate panel, the appellate court later agreed to rehear the appeal and, in a June 27, 2012 opinion, changed the original appellate opinion and reversed the trial judge's decision. Finding that the plaintiff did in fact present facts sufficient to give rise to a legitimate dispute as to the existence of an agency relationship, the appellate court remanded the case back to the trial court for a jury trial on the sexual harassment claims against Domino's Pizza.

As expected, the opinion in Domino's Pizza now serves as a catalyst for copycat lawsuits by plaintiffs' lawyers. I recently ran across a lawsuit by a former employee of a Jack In The Box franchisee against both Jack In The Box and the franchisee. In the lawsuit, filed on May 25, 2012 in state court in San Diego, the franchisee's employee asserts a panoply of claims arising out of the alleged sexual harassment by one of the franchisee's employees. In typical fashion, the plaintiff asserted claims against Jack In The Box under the theory of agency – i.e., the franchisee is the agent of Jack In The Box. Although this lawsuit was filed about a month before the appellate court's decision in Domino's Pizza, the lawsuit was pursued against Jack In The Box because of the opening provided by the Domino Pizza's case.

It's too early to tell what will become of the Domino's Pizza case, but it well may settle somewhere down the road. And it is possible that the Jack In The Box case may eventually be thrown out on summary judgment. For now, however, the aftermath of Domino's Pizza on franchising operations in California is potentially two-fold: (i) more lawsuits by franchisees and their employees against franchisors under agency theories of liability; and, (ii) a studied reluctance by trial courts to summarily dismiss these lawsuits prior to trial.

These cases necessarily involve the franchisor's need to impose mandatory system-wide standards and requirements on its franchisees – which are necessary to protect the value of the brand and to provide the end user with a uniform and predictable experience – and the corresponding maintenance of the franchisee's independent actor status and responsibility for the conduct of its business operations. It is obvious that the way to protect the franchisor in these situations is to strike an appropriate balance between the franchisor's control and the franchisee's independent discretion, but there is no way to identify any bright line between those two competing – and potentially conflicting – value statements. And it is not sufficient to say that the decision should be left to a jury.